SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1967

No. 430

G. I. DISTRIBUTORS, INC.,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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Opinions Below

The opinions of the New York Court of Appeals (majority and dissenting) is reported *sub nom. People* v. *G. I. Distributors, Inc.*, at 20 N Y 2d 104. The Appellate Term of the New York Supreme Court, Second Judicial Department—the intermediate appellate court—did not write an

opinion; however, there was a dissenting opinion which has not been reported but is printed as an appendix to the petition at pp. 15-17. The Criminal Court of the City of New York, County of Queens, wrote no opinion.

Jurisdiction

This petition for a writ of certiorari to the Court of Appeals of the State of New York seeks review, pursuant to the provisions of 28 U.S.C.A., §1257 (3), of an order of that court entered June 1, 1967, affirming by a divided vote (FULD, Ch.J., dissenting) in an opinion by BREITEL, J., an order of the Appellate Term of the New York Supreme Court, Second Judicial Department, entered December 30, 1966, which had affirmed by a divided vote (GULOTTA, J., dissenting), a judgment of the Criminal Court of the City of New York (TOLLERIS, P.J.; WEINFELD and O'NEILL, JJ.), County of Queens, rendered June 3, 1966, convicting the petitioner, after trial, of a violation of Section 1141 of the New York Penal Law (OBSCENE PRINTS AND ARTICLES) and imposing a fine of two hundred and fifty dollars (6-7, 23-4, 27-31).*

On July 7, 1967, the New York Court of Appeals denied a motion by petitioner, insofar as it sought reargument but granted it to the extent of amending its remittitur to provide that:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether defendant-

* References, unless otherwise indicated, refer to pages of the Record on Appeal filed in the New York Court of Appeals.

appellant's rights under the due process clause of the Fourteenth Amendment were violated. Defendant argued that the material upon which the prosecution was based was not obscene, that there was a burden upon the People to produce evidence of contemporary community standards, and that it was necessary for the prosecution to prove that defendant had reason to believe that the material violated the law. The Court of Appeals held that the constitutional rights of defendant-appellant had not been violated."

Pertinent Provisions of the United States Constitution

Amendment I of the United States Constitution reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV, Section 1 of the United States Constitution reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent Statute

The relevant portions of Section 1141 of the New York Penal Law, upon which the informations are based, read as follows:

> "A person who * * * has in his possession with intent to sell, lend, distribute, give away, show or transmute * * * any obscene * * * book * * * [i]s guilty of a misdemeanor * * *"

Statement of the Case

The Information

By information filed in the Criminal Court of the City of New York, Queens County, by the District Attorney of that county on November 10, 1965, the petitioner was accused of unlawfully possessing with intent to sell a quantity of obscene books (6). At the commencement of the trial, the information was amended upon consent of all parties to specify the names of the books in question (9-10). The books thus specified were "Grecian Guild Studio Quarterly No. 15," "Gay Reunion" and "The Innocent Lesbian" (10).

The Prosecution's Evidence at Trial

Patrolman **William Farberman** of the New York City Police Department testified that, at about 2:00 p.m., on September 29, 1965, he visited petitioner corporation's premises.

The witness informed a Mr. Herman, president of petioner corporation, that he was a police officer, displayed a search warrant (Exhibit 1), and told Mr. Herman that he

"had come to search for pornographic material" (12). Mr. Herman replied that "he had no pornographic material" (12). Upon the officer's showing Mr. Herman copies of "The Innocent Lesbian," "The Gay Reunion," and "Grecian Guild Studio Quarterly No. 15" (Exhibits 2-4) and stating that the books are pornographic in the opinion of the Police Department's legal bureau, the latter stated "These are not pornographic" (12-13). The officer then asked if Mr. Herman had copies of the book in stock, and was advised "Yes, we have some. We will go to the warehouse and find them, we will look for them" (13). Search of the petitioner corporation's warehouse disclosed 478 copies of "The Innocent Lesbian" (Exhibit 2) and 1735 copies of "Grecian Guild Studio Quarterly No. 15" (Exhibit 4) (13-14). No copies of "Gay Reunion" (Exhibit 3) were found (14).

The Conviction

The trial court, during the trial, dismissed the charge concerning "Gay Reunion" (Exhibit 3) because copies of that book had not been found on petitioner's premises (14-15). The petitioner was found guilty of the charge relating to "Grecian Studio Quarterly No. 15" (Exhibit 4) but acquitted on the charge relating to "The Innocent Lesbian" (Exhibit 2).

POINT ONE

The conclusion of the New York Court of Appeals that the record supported findings of obscenity and scienter is in conformity with the decisions of this Court.

A. As to Obscenity

In determining that the book entitled "Grecian Guild Studio Quarterly" is obscene, the New York Court of Appeals did so with reference to principles laid down in this Court's decisions in *Roth* v. *United States*, 354 U. S. 476, 488-9 (1954) and *Mishkin* v. *New York*, 383 U. S. 502, 508 (1966) and in its own decision in *People* v. *Richmond County News*, 9 N Y 2d 578, 587 (1961).

This Court held in *Roth* that obscene material—matter dealing "with sex in a manner appealing to prurient interest"—was without the protection of the First Amendment of the United States Constitution (354 U. S. 476, 481, 487). It further held that the test to be utilized in determining obscenity is "whether to the average person, applying community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (*id.*, at p. 489).

The New York Court of Appeals in *Richmond County News* declared that this Court in *Roth* was charting only "the broad boundaries of any permissible definition of obscenity under the United States Constitution" but was not giving "specific content to the meaning of 'obscene' as it appears in * * * [the New York] statute" (9 N Y 2d 578,

585-586). The New York Court declared that the strictures of the New York obscenity statute (N. Y. Penal Law, §1141) "should apply only to what may properly be termed 'hard core pornography'" (*id.*, at p. 586). It then stated (*id.*, at p. 586-587):

> "As the Supreme Court observed in the *Roth* case (354 U. S. 476, 487, *supra*), 'sex and obscenity are not synonymous.' (See, also, *Mounce* v. *United States*, 355 U. S. 180, revg. 247 F. 2d 148; *One, Inc.* v. *Olesen*, 355 U. S. 371, revg. 241 F. 2d 772; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372, revg. 249 F. 2d 114.) Under our statute, section 1141 of the Penal Law, the test of the obscene, of the pornographic, is not in the tendency or appeal of the material, but rather in its content objectively appraised. (See Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 58-68.) It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Lawrence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty'. (Murray, Literature and Censorship, 14 Books on Trial 393, 394; see also, Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 65.)"

In *Mishkin*, this Court had occasion to comment on its prior decision in *Roth* and upon the New York Court of

Appeals decision in *Richmond County News*. Concerning the "average person" element of the *Roth* definition of obscenity, it was stated that (383 U. S. 502, 508):

> "Where the material is designed primarily for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."

As to the New York definition of obscenity enunciated in *Richmond County News*, this Court declared (383 U. S. 502, 508):

> "The New York courts have interpreted obscenity in §1141 [of the New York Penal Law] to cover only so-called 'hard-core pornography,' see *People* v. *Richmond County News, Inc.*, 9 N Y 2d 578 * * * Since that definition of obscenity is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of §1141 below."

Viewing the book here in issue in its entirety [*Roth* v. *United States*, 354 U. S. 476, 489-490 (1957)], there can be no question but that it constitutes "hard-core pornography" and is, therefore, obscene [*People* v. *Richmond County News*, 9 N.Y.2d 578, 586 (1961)]. "Grecian Guild Studio Quarterly" is a soft-covered book of approximately sixty pages with a dollar price tag. It contains on practically every page photographs of nude men in various activities. Some of these photographs show men wrestling with one another with one of the contenders pulling down the other's shorts or ripping the other's clothes; others

depict a nude male being whipped; one depicts a nude male fondling the private parts of a nude young boy; another shows the nude young boy fondling the private parts of the nude adult male; and yet another depicts a nude adult male apparently sodomizing a nude young boy.

Furthermore, as the New York Court of Appeals noted (20 N Y 2d 104, 107):

> "Finally, if there were still any doubt as to the motivation for the publication and the purpose of its appeal, the centerleaf advertising would make them utterly clear. Referring to one of the books advertised it states 'Here is a book with something for everybody —everybody with any of the known perversions, that is—and if the author'. One of the chapters is described as containing 'a long and precise lesson on how to perform fellatio properly', belonging in 'a gay sex manual'. This language, of course, does not refer to the photographs but is addressed to the same audience as the photographs in the pamphlet in question and is therefore part of the relevant context."

In this connection, the petitioner declares "We do not see how the finding of obscenity in the case at bar can stand in view of this Court's decision in *Redrup* * * * [v. *New York,* 386 U. S. 767 (1967)], and the dozen or so cases decided on June 12, 1967" (Petition, p. 12). However the rationale of *Redrup* may be viewed, it is respectfully submitted that, since as demonstrated, the finding of obscenity in the case at bar is consistent with the decisions of this Court in *Roth* v. *United States,* 354 U. S. 476 (1957) and in *Mishkin* v. *New York,* 383 U. S. 502 (1966), there is no basis warranting this Court's review of this case.

Finally, in this same connection the petitioner's contention (Petition, p. 12), that "the question of the extent to which material appealing to homosexuals is protected should be settled by this Court" lacks merit. The precise question herein posited by petitioner was settled by this Court in its recent decision of *Mishkin* v. *New York,* 383 U. S. 502 (1966) wherein, as already noted (*supra,* p. 8), it was stated that (383 U. S., *supra,* p. 508):

> "Where the material is designed primarily for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."

The petitioner further claims that the prosecutor in an obscenity case must prove "the limits of candor in the Nation as a whole" otherwise no finding can be made that the book here in issue "goes substantially beyond customary limits of candor in description or representation of such matters" and is, therefore, obscene (Petition, pp. 6-10).

This contention, however, is belied by several of the decisions of this Court.

To begin with, in *Manual Enterprises* v. *Day,* 370 U. S. 478, 487 (1962), this Court characterized the issue of obscenity as one "* * * involving factual matters entangled in a constitutional claim." Speaking in the same vein, the New York Court of Appeals in *People* v. *Richmond County News,* 9 N Y 2d, *supra,* at 581, noted that:

> "It [obscenity] involves not a simple question of fact, but a mixed question of fact and constitutional law, calling upon the court to make an appraisal of a publication and its contents against the requirements embodied in both State and Federal Constitutions (N. Y. Const., art. I, §8; U. S. Const., 1st and 14th Amdts.)."

This Court, moreover, in *Ginzburg* v. *United States,* 383 U. S. 463 (1966) had occasion to comment on this point. In that case, a prosecution under the federal obscenity statute (18 U.S.C. §1461), the Court noted that the question there involved was whether the trial court had properly applied the standards for determining obscenity laid down in *Roth* v. *United States,* 354 U. S. 476 (1957) and stated (*Ginzburg* v. *United States, supra,* at 464):

> "In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise."

Since the Court has "* * * regarded the materials as sufficient in themselves for the determination of the question * * *" of obscenity, it is quite clear that affirmative proof of community standards is not mandated. That be-

ing so, determination of obscenity consists simply in analyzing the purportedly obscene material in the light of the *Roth* standards without more. As the Court noted, the only exception to this method of analysis is where the prosecution, as in *Ginzburg,* charges the offense of obscenity in the context of the circumstances of production, sale and publicity and assumes that the material when considered alone and apart from the aforementioned circumstances may not be obscene. That, however, is not the situation here. Recourse to the circumstances just mentioned is unnecessary for, as demonstrated, the book "standing alone" is obscene.

In this connection, the defendant cites *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964), for the proposition that national, not local standards must be applied in obscenity cases. Its citation of *Jacobellis* for the proposition espoused is correct.

A determination by the New York Court of Appeals that the book constitutes "hard-core pornography" and is therefore obscene as that term is defined in *People* v. *Richmond County News,* 9 N.Y. 2d 578, 586 (1961) and *People* v. *Fritch,* 13 N.Y.2d 713 (1963) is not violative of the "national test" doctrine of *Jacobellis.* In *Mishkin* v. *New York,* 383 U. S. 502, 508, this Court commented on the New York "hard-core pornography" test in the following language:

> "'The New York courts have interpreted obscenity in §1141 to cover only so-called 'hard-core pornography,' see People v. Richmond County News, Inc., 9 N.Y.2d 578, 586, 587, 175 N.E.2d 681, 685, 686 (1961),

> quoted in note 4, supra. Since that definition of obscenity is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of §1141 below."

Since the test of obscenity by virtue of *Richmond County News* is stricter than that mandated by *Roth*, the "national test" doctrine has been satisfied.

It is noted that the petitioner, in substance, complains that "First Amendment protections" are here endangered by the New York Court of Appeals having taken judicial notice of the national standard of candor (Petition, p. 9). From what has been demonstrated, what the Court of Appeals judicially noticed was a rule or standard of law, *viz.*, the *Roth-Richmond County News* definition of obscenity which is an entirely proper use of the doctrine of judicial notice [see IX Wigmore on Evidence, §2572, pp. 551-554 (3d ed. 1940)]. The petitioner's citation of *Garner* v. *Louisiana*, 368 U. S. 157 (1961) is inapposite (Petition, p. 9). There this Court refused to judicially notice the purported fact that the presence of a Negro at a racially segregated lunch counter in Louisiana might cause a disturbance. That situation is quite distinct from the case at bar, where a rule of law, not a set of facts, was judicially noticed.

B. As to Scienter

In *Smith* v. *California*, 361 U. S. 147 (1959), this Court held that a Los Angeles obscenity ordinance was violative of the First Amendment to the United States Constitution because the statute—both on its face and as interpreted by the California courts—did not include scienter as an ingredient of the crime defined therein. Thereafter, the

New York Court of Appeals held that scienter was an element of the crime defined by the New York obscenity statute (Penal Law, §1141) and that, accordingly, the statute was constitutional [*People* v. *Finkelstein,* 11 N Y 2d 300 (1962), *cert. den. sub nom. Finkelstein* v. *New York,* 371 U. S. 863 (1962); and see *Mishkin* v. *New York,* 383 U. S. 502 (1966)].

The petitioner contends that scienter means "not only that the accused knew what kind of material was involved but also that he had reason to believe the material violated the law" (Petition, p. 12). This contention lacks merit.

In *People* v. *Finkelstein,* 11 N. Y. 2d 300 (1962), *cert. den.* 371 U. S. 863 (1962), the New York Court of Appeals citing *Smith* v. *California,* 361 U. S. 147, 149 (1959), defined scienter as "knowledge by * * * [defendants] of the contents of the book[s]." This Court in *Mishkin* v. *New York,* 383 U. S. 502, 511 (1966), noted that the Court of Appeals, in the earlier *Finkelstein* case, had defined scienter in the following language (9 N.Y.2d 342):

> "A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised * * *."

This Court then noted (383 U. S., *supra,* at 511, footnote 9) that the definition in the second *Finkelstein* case was not a modification of that set forth in the first *Finkelstein* case. Accordingly, scienter—insofar as obscenity cases are concerned—means knowledge of the contents of the material in issue.

Here, there was ample proof that the defendant, through its president, had knowledge of the contents of the book (*cf.*, petition, pp. 10-12). The president's declarations to the police officer that the book was not pornographic (12, 13) was an opinion based on familiarity with the subject matter of the book in issue [see *People* v. *Finkelstein,* 11 N.Y.2d 300, 303-304 (1962); *Mishkin* v. *New York,* 383 U. S. 502, 511 (1966)]. Moreover, the photograph on the front cover of the book with the dollar price tag further buttresses the conclusion of the defendant's knowledge [see *People* v. *Finkelstein,* 11 N.Y.2d, *supra,* at pp. 303-304; *Mishkin* v. *New York,* 383 U. S., *supra,* at 511].

In view of the foregoing, it is respectfully submitted that the conclusion of the New York Court of Appeals that the record supported findings of obscenity and scienter is in conformity with the decisions of this Court.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1967